DATE: June 3, 1996
CASE NO. 94-FLS-22

ROBERT B. REICH,
Secretary of Labor,
United States Department of Labor,
Complainant

v.

BAYSTATE ALTERNATIVE STAFFING, INC.,
ABLE TEMPS REFERRALS, INC., ANN F. WOODS,
HAROLD WOODS, WILLIAM "BILL" WOODS AND MARLENE
WOODS, ALL d/b/a ALTERNATIVE STAFFING,
Respondents

APPEARANCES:

John S. Casler, Esq.
Deputy Solicitor/Counsel for ESA

Susan G. Salzberg, Esq.
For the Plaintiff

Edward DeFranceschi, Esq.
For the Respondents

DECISION AND ORDER

This is a proceeding under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. 201, **et seq.** (hereinafter "the Act" or "FLSA" wherein the Plaintiff seeks the imposition of civil money penalties in the amount of $150,000.00 for willful violations of Section 7 of the Act. Hearings were held before this Administrative Law Judge on January 22 and 23, 1996 in Worcester, Massachusetts and the parties were given the opportunity to offer arguments, testimony and documentary evidence in support of their respective positions. Post-hearing briefs were filed by Plaintiff (PX 22) and the Respondents (RX 7) and the record was closed on April 29, 1996. The following references will be used herein. "ALJ EX" for an exhibit offered by this Administrative Law Judge, PX for a Plaintiff's exhibit, RX for a Respondents' exhibit and TR for the official hearing transcript.

PROCEDURAL HISTORY

This proceeding began with an **ORDER OF REFERENCE**, dated June 16, 1994 and docketed with the Chief Judge on June 20, 1994, in which the Regional Administrator, Wage and Hour Division, as the duly delegated representative of the Secretary of Labor, herein jointly referred to as the Plaintiff, has assessed a civil money penalty in the amount of $150,000.00 against the corporations and the individuals identified in the above-captioned matter, pursuant to Section 16(e) of the Fair Labor Standards Act, as amended, 29 U.S.C. 216(e), (herein "FLSA" or the "Act"), and in accordance with 29 C.F.R. Part 578, as a result of alleged willful violations of the overtime provisions of the Act. This matter was transferred to the Office of Administrative Law Judges for a final determination of the alleged violations for which the civil money penalty was imposed, as provided in 29 CFR Part 580, and the appropriateness and reasonableness of said penalty, as provided by 29 CFR Part 578. (ALJ EX 1)

The matter was assigned to this Administrative Law Judge and on December 16, 1994 I issued a **Notice of Hearing and Pre-Hearing Order** and the hearing was scheduled for the week of June 5, 1995 due to the anticipated discovery herein. (ALJ EX 2) Counsel for Plaintiff, by motion filed on February 6, 1995 (ALJ EX 3), moved to amend the **ORDER OF REFERENCE** to add Marlene Woods and William "Bill" Woods as "(f)urther investigation has revealed facts that lead to the conclusion that the two named additional individuals had substantial supervisory control of affected employees of the named corporations, as well as control of the business affairs and operations of those corporations." (ALJ EX 4)

Plaintiff, by motion dated on February 3, 1995, filed a **Motion For Postponement of Hearing** "for a period of five months" to permit additional discovery by the parties to enable them to "further narrow the issues in conflict in this case." (ALJ EX 6) The postponement was granted on February 9, 1995 as Respondents interposed no objection thereto. (ALJ EX 7) Thereafter, Plaintiff, by motion dated May 15, 1995, filed a **Motion To Amend Order Of Reference To Enlarge Period Covered** by the **ORDER OF REFERENCE** from April of 1993 to June 30, 1994. The assessed civil money penalty was not increased. (ALJ EX 9) The motion was granted as Respondents did not object thereto. On July 17, 1995 I issued a **NOTICE OF RESCHEDULED HEARING AND AMENDED PRE-HEARING ORDER** directing that pre-hearing exchanges be filed on or before December 29, 1995 and scheduling the hearing to begin on January 22, 1996. (ALJ EX 10, ALJ EX 13)

Respondents' **MOTION FOR CONTINUANCE**, filed on December 21, 1995 (ALJ EX 15), was **DENIED** but, "due to the partial government shutdown, the pre-hearing exchange (was) extended to January 8, 1996. (ALJ EX 16) The Plaintiff's Pre-Hearing exchange was filed

on January 8, 1996 (ALJ EX 17) and Respondents' initial exchange was also filed on the same date. (ALJ EX 20) The Plaintiff also filed a brief in support of the imposition of the civil money penalty assessed against Respondents. (ALJ EX 19) Respondents filed a supplemental exchange on January 18, 1996 (ALJ EX 21), as well as a brief in opposition to the imposition of the civil money penalty assessed herein. (ALJ EX 22)

EVIDENTIARY ISSUE

Plaintiff has offered the December 19, 1995 **AFFIDAVIT OF ROBERT LaBERGE** (PX 13) and Respondents vigorously object to its admission into evidence as they have been deprived of the opportunity of cross-examining Mr. LaBerge either at the hearing or at a pre-hearing deposition. Mr. LaBerge served from 1962 until 1995 as Manager of Employee Relations of Personnel at Tucker Housewares, Inc., a manufacturer of various plastic products, a wholly-owned subsidiary of Mobil Corporation, located in Leominster, Massachusetts. Mr. LaBerge "suffered a serious heart attack in November of 1995" and he was unable to testify at the hearing before me. (TR 8, 11-16, 340-344)

The parties were given thirty (30) days to arrange a post-hearing deposition of Mr. LaBerge. However, apparently the affiant's physical condition presented the taking of his deposition and Plaintiff has again moved for the admission of the Affidavit. (PX 21) Respondents again object to the Affidavit as they have been deprived of their due process rights to cross-examine Mr. LaBerge. (RX 5, RX 6)

I agree with Respondents on this issue and I sustain their objection to Mr. LaBerge's affidavit. The right of confrontation of a witness is one of the essential tenets of our American judicial system and while the rules of evidence are somewhat relaxed in an administrative proceeding, nevertheless the opposing party must have the opportunity to cross-examine the affiant. In the case at bar, the affiant's physical evidence has prevented his availability at the hearing and at a post-hearing deposition. The introduction of such affidavit into evidence would greatly prejudice Respondents in this proceeding. In this regard **see Richardson v. Perales**, 402 U.S. 389 (1971); **Bethlehem Steel Corporation v. Clayton**, 578 F.2d 133, 8 BRBS 663 (5th Cir. 1978).

Plaintiff submits that I should admit the affidavit as the witness is unavailable and as an exception to the hearsay rule. I disagree as it is that very unavailability which has prejudiced the Respondents herein.

I also agree with Respondents' basic position that the Plaintiff "has not provided sufficient basis to deprive the Respondents of the right of cross-examination of Mr. LeBerge. The

hearsay exception relied upon by the Complainant Rule 894(b)(5). (**See also** 29 CFR 18.804(b)(5)) requires three (3) things: 1) the statement is offered as an evidence of material fact; 2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts and 3) the general purpose of these rules and the interest of justice will best be served by admission of the statement into evidence. The Plaintiff fails to meet Item 804(b)(5) of the Federal Rules, 28 CFR 18.804(b)(5)(ii) in that there is no reason to assume that Mr. LaBerge's statement would be more probative than other evidence which the proponent could have procured through reasonable efforts. Most of the information relevant to this matter would be part of the books and records of Tucker Housewares insofar as it would show the amount paid the workers, when the workers were employed, how many, what they were paid and what hours they worked. In addition, supervisors at Tucker interacted with the workers as described by Mr. LaBerge. Those witnesses and records were available to the proponent. The proponent took no steps to seek them and to admit Mr. LaBerge's testimony as "more probative" on any of the points for which it is offered; does not serve the general interest of justice. The Respondents would have shown, under cross-examination, that Mr. LaBerge's testimony as reflected in the affidavit, is inaccurate. Mere statements that Mr. LaBerge's affidavit is "more probative on the point for which it is offered than any other evidence which the proponent can produce through reasonable efforts" is inaccurate, does not meet the general requirements of the rule . . ." (RX 6)

Moreover, I am not persuaded that Mr. LaBerge is the only person who could have given a similar affidavit on the items contained therein. Furthermore, documentary evidence from Tucker Housewares could have been offered to establish the points attempted to be made by the affidavit. Moreover, the parties' **STIPULATIONS** (JX 1), specifically 2(B)-(F), essentially deal with the same issues as Mr. LaBerge's affidavit.

Thus, the affidavit (PX 13) is not admitted into evidence and shall be placed in the Rejected Evidence folder.

SUMMARY OF THE POSITIONS

PLAINTIFF

The Plaintiff seeks in this case the imposition of civil money penalties in the amount of $150,000.00 for the willful violation by the Respondents of Section 7 of the FLSA of 1938, as amended, 29 U.S.C. 201, **et seq.** According to Plaintiff, William "Bill" Woods formed and operated a temporary employment business, which included approximately ten corporations in Massachusetts and New Hampshire, operating both concurrently and consecutively over the last twelve to thirteen years. Plaintiff alleges that William Woods could not

form or operate these businesses in his own name and, thus, set up

various family members, including his wife Marlene Woods, his sister Ann Woods and his son Harold Woods as officers of the corporations.

According to Plaintiff, although the corporate names of this business changed over the years, the basic business and its operations remained the same, **i.e.**, providing unskilled day workers to manufacturers and other businesses. Respondents paid these workers only the minimum wage and then charged the client company an approximate $3.00 premium per worker per hour and, until July of 1994, these workers were never paid overtime. The Respondents allegedly told their prospective customers that by using Respondents' day workers they would save money since the Respondents would handle all the "burdensome paperwork, bookkeeping, record keeping, payroll costs and government reporting." Respondents also promised to provide transportation service to and from the job site and all insurance coverage. Moreover, according to Plaintiff, until July of 1994 the Respondents handled the "burdensome paperwork, record keeping, payroll and government reporting" by classifying these low skill hourly paid workers as independent contractors.

Plaintiff further submits that the Respondents have known since at least 1989 that these workers were not independent contractors, that Respondents did not change this practice even after two investigations by the Wage and Hour Division wherein Respondents were told that such misclassification violated the Act and that "Respondents continued to fail to pay overtime to the day workers until July of 1994."

In conclusion, Plaintiff submits that the Respondents willfully violated Section 7 of the Act because "They have known since 1989 that what they were selling their clients was an illegal scheme to violate state and federal labor laws," that Respondents "have profited substantially from this practice" and that the "civil money penalties assessed are appropriate and should be imposed both as punishment of these employers and as a deterrent to future potential violators." (ALJ EX 19; TR 32-39)

RESPONDENTS

On the other hand, Respondents submit that they have not willfully violated the Act because "in 1983 and in 1990, the Respondents received legal advice from Robert U. Holden, their attorney, now deceased, that the laborers they placed were not employees of themselves as individuals or any corporate entities they operate. In July 1991, as part of an Internal Revenue Service proceeding wherein the Internal Revenue Service sought to hold Harold Woods and Ann Woods, both Respondents, as persons responsible to collect, account for, and pay over the employee

portion of U.S. individual income tax and F.I.C.A. taxes, Mr. Holden restated his opinion in affidavits to the Internal Revenue Service where he stated, "It was my opinion that persons procured for various employers by Harold Woods or his corporations were not employees of Harold Woods or his corporation." (ALJ EX 22)

Respondents further submit that they entered into an agreement with the Wage and Hour Division "with respect to their compliance with the Fair Labor Standards Act," that they "were represented in that matter by John T. Bresnahan, CPA, and James M. Walsh, Esq.," and that "Mr. Bresnahan and Mr. Walsh were of the opinion that the issues involving the placement of temporary laborers was not covered by any agreement with the Department of Labor, but rather, it was their view that the Department of Labor had accepted the Respondents' treatment of the laborers as non-employees."

According to respondents, "three different professionals have advised the Respondents that their actions are in compliance with the law" and, thus, "there can be no reckless disregard of the law by Respondents in following the advice of professionals obtained by them for the specific purpose of representing them in administrative proceedings involving the Department of Labor and the enforcement of the Fair Labor Standards Act. No civil money penalties can be sustained," according to Respondents. (ALJ EX 20; TR 39-43)

Summary of the Evidence

Respondent William "Bill" Woods formed and operated a temporary employment business which included approximately ten corporations in Massachusetts and New Hampshire, operating both concurrently and consecutively over the last twelve to thirteen years. Mr. Woods believed he would have a problem getting a permit to run temporary agencies, due to a previous conviction for mail fraud. (TR 194; **U.S. v. Ciampaglia, Woods, Canessa, and Gintner, Bancroft and McNiff**, 628 F.2d 632 (1st Cir. 1980). With the aid of his Attorney, Robert Holden, Woods purposefully excluded his name from any corporate documents, instead setting up various family members, including his wife Marlene Woods, his sister Ann Woods and his son Harold Woods as officers of the corporations. (TR 194)

Although the corporate names changed over the years, the basic business and its operations remained the same; providing unskilled day workers to manufacturers and other businesses. he Woods paid these workers usually only the minimum wage and then charged the client company an approximate $3.00 premium per worker per hour. (PX 2 at 54) Up until July of 1994, these workers were never paid overtime. (PX 3, No. 91-99, and 123-124)

The Respondents told prospective customers that by using

Woods' day workers they would save money since the Respondents would "handle all the burdensome paperwork, bookkeeping, record keeping, payroll costs, and government reporting". (PX 4) They also promised to provide transportation service to and from the job site and all insurance coverage. The Respondents handled the "burdensome paperwork, record keeping, payroll and government reporting" by classifying these low skilled hourly paid workers as independent contractors. Respondents' business was in effect to illegally cut off low wage employees from federal and state protective labor legislation; in return for this service Respondents kept almost half of the earnings of these workers.

As early as 1989, the Respondents knew these workers were not independent contractors. They had been told by the Supreme Court of New Hampshire in the context of unemployment compensation that these dayworkers did not engage "in an independently established trade, occupation, profession or business..." **Appeal of Work-A-Day of Nashua, Inc.**, 564 A.2d 445, 447 (N.H. 1989).

The employment status of these workers was again brought to Respondents' attention by the Massachusetts Commissioner of Employment and Training in 1989, in a proceeding in which Massachusetts took the position that these workers were the employees of respondents and that Respondents were obliged to contribute to the unemployment compensation fund with respect to these workers' wages. **Work-A-Day of Fitchburg, Inc. v. Commissioner of the Department of Employment and Training**, Case No. 9016-CV-0147 (May 6, 1992) (attached to PX 3). The Commissioner's decision was affirmed by the Massachusetts Board of Review in 1990. Id. The Supreme Judicial Court for the Commonwealth remanded the case to the Board in 1992 stating,

> We have no difficulty in concluding that in performing their services the workers are in employment as defined in G. L. c. 151A..., at least for the reason that they are receiving wages and are not 'free from control and direction in connection with the performance of such services'. It is true that both Work-A-Day and the client exercise some control over the workers. But the workers surely are not free from control. The question for decision then is whether, for the purposes of G. L. c. 151A, the workers are in employment of Work-A-Day or its respective clients.[1]

Id., at 4.

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[1] The Court then considers in a footnote the possibility that both Work-A-Day and the client agencies could be employers of these workers.

In 1994, the Board of Review, on remand, held that the workers were employees of Work-A-Day, citing the control the Respondents exercised over the workers it placed with clients such as its recruitment, placement and payment of workers. **In the Matter of Work-A-Day of Fitchburg, Inc**, Decision of Board of Review, Appeal no. X-1216-A-CT-RM, at p.3 (June 9, 1994); **See Also** **In the Matter of Able Temps, Inc.**, Decision of Board of Review, Appeal No. X-2041-A (June 10, 1994) (both attached to PX 3).

Although Respondents were put on notice as early as 1989 that their practice of calling their workers independent contractors in order to avoid their responsibilities as an employer was illegal, they did not change this practice.

In 1990, the U.S. Department of Labor investigated the Respondents. Investigator William Pickett met with the representative of the Respondents, Attorney James Walsh, a number of times. At the first face to face meeting, Mr. Pickett was satisfied that "in house employees" of the Respondents, such as clerical and telemarketing workers, were paid in compliance with the Act. (TR 50-51, 59 and 65) Mr. Pickett, at that meeting, and at all subsequent meetings, placed the focus of the investigation clearly on the day workers, specifically requesting that time records of the day workers be produced. (TR 51)

Mr. Pickett gave Mr. Walsh a copy of a government publication, originating in the Wage and Hour National Office, entitled "Employment Relationship Under the Fair Labor Standards Act." (WH Publication 1297, Revised May 1980) (TR 51; PX 20) This publication is handed out generally to all individuals and companies that are investigated by Wage and Hour. (TR 51) Mr. Pickett used that document to review with Attorney Walsh the six factors that the Supreme Court uses to help people make a distinction between an employee and a nonemployee under the Act (TR 53).[2]

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[2] In addition to the section covering the Supreme Court's six part test of employment, this pamphlet has a section entitled "Joint Employment" on pages 8 and 9. In that section, the pamphlet states,

> ...a joint employment relationship generally will be considered to exist in situations such as:...Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee. For example, employees of a **temporary help company** [emphasis added] working on assignments in various establishments are considered jointly employed

Attorney Walsh testified that he remembered Mr. Pickett indicating that the Department's position was that these people were employees. (TR 283)

Since no records of day workers' hours worked were produced in response to the request of Mr. Pickett and a substantial number of questionnaires sent out to the dayworkers were returned unopened due to inaccurate addresses, he was unable to determine if any overtime hours had been worked. (TR 60 and 62) Mr Pickett was therefore only able to allege recordkeeping violations as to those day workers. The Respondents entered into a stipulation of compliance, and the Department officially closed the initial investigation.

Although Attorney Walsh contended at trial that the Stipulation executed at the close of that investigation "...kept the position, I felt, of Able Temps open...", he did not dispute Mr. Pickett's testimony that he had been made well aware of the Department of Labor's position. Since Respondents continued in violation, willfulness is established under the test applicable to this proceeding. 29 C.F.R. §578.3(c)(2). When a subsequent Wage Hour investigation was conducted two years later, Respondents stalled and even defied a court order before finally turning over the records which they had refused to turn over in 1989. What is more they continued in violation until July of 1994.

I. LEGAL DISCUSSION OF EMPLOYMENT RELATIONSHIP

(a) WHO IS AN "EMPLOYEE"?

The crux of this case is whether or not the temporary day workers are independent contractors, as Respondents submit, or whether they are employees of the Respondents, as Plaintiff alleges. The answer to this question requires an analysis of the employment relationship to determine who is an employee under FLSA.

> by the temporary help company and the establishment in which they are employed. In such a situation each individual company where the employee is assigned is jointly responsible with the temporary help company for compliance with the minimum wage requirements of the act during the time the employee is in a particular establishment. **The temporary help company would be considered responsible for the payment of proper overtime compensation to the employee since it is through its act that the employee received the assignment which caused the overtime to be worked**(emphasis added).

Under the Act, an "employee" is broadly defined as "any individual employed by an employer" "'Employ' includes to suffer or permit to work". 29 USC §§203(e)(1) and 203(g).

The scope of the employer-employee relationship has been interpreted expansively by the Supreme Court. **Rutherford Food Corp. v. McComb**, 331 U.S. 722, 728-729 (1947); **United States v. Rosenwasser**, 323 U.S. 360, 363 (1945). As stated by the First Circuit in **Donovan v. Agnew**, 712 F.2d 1509, 1513 (1st Cir. 1983),

> To gauge the scope of the employer-employee relationship in particular contexts, the Supreme Court has looked not only to the definitions of employer and employee but to the entire remedial context of the Act....The Court has not looked to "technical" common law concepts to define the scope of the Act, but rather to "economic reality". (quoting **Goldberg v. Whitaker House Cooperative, Inc.**, 366 U.S. 28, 33 (1961).

Further, the Supreme Court has emphasized that "the determination of the relationship does not depend on...isolated factors but rather upon the circumstances of the whole activity." **McComb**, 331 U.S. at 730. A number of factors, while not individually controlling, are "relevant in determining whether individuals are employees or independent contractors for purposes of the FLSA." **Brock v. Superior Care, Inc.**, 840 F.2d 1054, 1058-1059 (2d Cir. 1988). **See Also** **Martin v. Selker Brothers, Inc.**, 949 F.2d 1286 (3d Cir. 1991); **Brock v. Mr. W. Fireworks, Inc.**, 814 F.2d 1042 (5th Cir. 1987) **cert. denied**, 484 U.S. 924 (1987); **Martin v. Albrecht**, 802 F. Supp. 1311 (W.D. Pa. 1992); and **Sec'y of Labor v. Lauritzen**, 835 F.2d 1529 (7th Cir. 1987) **cert. denied**, 488 U.S. 898 (1988).

These factors, termed the "economic reality test", were derived from a Social Security Act case, **United States v. Silk**, 331 U.S. 704 (1947), and are as follows:

> (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss and their investment in the business, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship, and (5) the extent to which the work is an integral part of the employer's business.

Superior Care, 840 F.2d at 1058-1059. As stated by that court, "No one of these factors is dispositive..." but rather "the test is based on a totality of the circumstances." **Id.**, at 1059. Further, "the ultimate concern is whether, as a matter of economic reality,

the workers depend upon someone else’s business for the opportunity

to render service or are in business for themselves." **Id.**; **See Also** **Bartels v. Birmingham**, 332 U.S. 126, 130, (Social Security Act); **Selker Brothers, Inc.**, 949 F.2d at 1293-1296; **Lauritzen**, 835 F.2d at 1534-1535; **Mr. W. Fireworks, Inc.**, 814 F.2d at 1047-1054; and **Albrecht**, 802 F.Supp. at 1313-1314.

(b) WHO IS AN EMPLOYER?

With reference to the status of an employer, the Act defines "employer" to "include [] any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. §203(d).

The courts look here also to the "economic reality" of the employment relationship in deciding whether a person or entity is an FLSA "employer", **Whitaker House**, 366 U.S. at 33 (1961); **Fegley v. Higgins**, 19 F.3d 1126, 1131 (6th Cir. 1994), **cert. denied**, 115 S.Ct. 203 (1994); **Donovan v. Agnew**, 712 F.2d at 1510.

Consequently, individuals with operational control over a corporation or business may be held jointly liable along with that corporation for violations of the Act. **Donovan v. Sabine Irrigation**, 695 F.2d 190, 196 (5th Cir. 1983) **Cert. denied**, 463 U.S. 1207 (1983), **citing Donovan v. Hamm's Drive Inn**, 661 F.2d 316 (5th Cir. 1981). Further, more than one employer may be concurrently liable for violations of the Act. **Falk**, 414 U.S. at 195; **Dole v. Simpson**, 784 F. Supp. 538, 544 (S.D. Ind. 1991).

This is true not only for owners of businesses, but also for corporate officers with operational control. **Sabine Irrigation**, 695 F.2d at 194-195. As stated by the First Circuit in **Agnew**, 712 F.2d at 1511, "The overwhelming weight of authority is that a corporate officer with operational control of a corporation's covered enterprise is an employer along with the corporation, jointly and severally liable under the FLSA for unpaid wages."

Some of the factors involved in the analysis of whether an individual is an employer include whether the individual has significant ownership interest, and whether he or she had operational control of significant aspects of the corporation's day to day functions, including compensation to employees. **Id.**, at 1514.

As stated by the Sixth Circuit, "to be classified as an employer, it is not required that a party have exclusive control of a corporation's day-to-day functions. The party need only have 'operational control of **significant aspects** of the corporation's day to day functions'"(emphasis in original). **Dole v. Elliott Travel and Tours, Inc.**, 942 F.2d 962, 966 (6th Cir. 1991) (quoting **Agnew**, 712 F.2d at 1514).

I. CIVIL MONEY PENALTIES FOR WILLFUL VIOLATIONS OF THE ACT

Section 9 of the Fair Labor Standards Amendments of 1989 amended section 16(e) of the Act by subjecting employers to civil money penalties for repeated or willful violations of Section 6 or Section 7 of the Act.

The regulations define "willful" violations to include those situations "where the employer knew that its conduct was prohibited by the Act or showed reckless disregard for the requirements of the Act." 29 CFR §578.3(c)(1). The regulations further set out the parameters of willful behavior, stating "an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." 29 CFR §578.3(c)(2).

The regulation's definition of "willful" comes directly from **McLaughlin v. Richland Shoe Co.**, 486 U.S. 128, 133 (1988), the Supreme Court case defining willfulness under the Act. **See** 57 Fed. Reg. 49128 (1992). A number of cases since **Richland Shoe** have found willfulness, and have thus applied a three year statute of limitations where knowing violations or reckless disregard for the law were shown. **See Reich v. Waldbaum Inc.**, 52 F.3d 35, at 39-41 (2nd Cir. 1995) (Employer's belief that its hourly employees were bona fide executives exempt from overtime and record keeping requirements of the FLSA amounted to reckless disregard of the law); **Albrecht**, 802 F.Supp. at 1314-1315 (Case involving misclassification of homeworkers as independent contractors, which held employer who "was in a position to know" about another employer's previous violations of the Act to a three year statute of limitations); **Selker Brothers**, 949 F.2d at 1296 (Holding employer who misclassified gas station operators as independent contractors to a three year statute since the record showed the employer knew this could result in violations of the Act.). **See Also Superior Care**[3], 840 F.2d at 1062 (Temporary employment agency case, holding employers showed "reckless disregard" where a compliance officer had specifically advised them in a previous investigation that the temporary workers were employees).

Once it is established that an employer committed a willful violation or violations of the Act the Administrator of the Wage

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[3] While **Superior Care** was decided prior to **Richland Shoe**, this case adopted the willfulness standard the Supreme Court enunciated in **Trans World Airlines v. Thurston**, 469 U.S. 111, 127 (1985), an Age Discrimination in Employment Act case measuring "willfulness" for liquidated damages purposes under the ADEA. **Thurston** set forth the reckless disregard standard for willfulness later adopted by the Supreme Court in **Richland Shoe**.

and Hour Division may assess the civil money penalty. 29 CFR §578.3(a). In granting the Secretary, through the Administrator, the authority to assess these penalties, Congress believed it could deter potential violators of the Act. **See** 57 Fed. Reg. 49128 (1992) (quoting House Report No. 101-260, p.25, September 26, 1989).

The regulations also set out the manner in which the penalty is calculated. According to these regulations, "the Administrator shall consider the seriousness of the violations and the size of the employer's business." 29 CFR §578.4(a). Other factors the Administrator may consider include good faith efforts the employer made to comply with the Act, whether the violations "were the result of a bona fide dispute of doubtful legal certainty", the "previous history of violations", "the employer's commitment to future compliance", "the interval between violations", "the number of employees affected", and "whether there is any pattern to the violations". 29 CFR §578.4(b).

FACTUAL DISCUSSION

In analyzing the employment relationship between the Respondents and their temporary workers, the "economic realities test" as applied to the undisputed facts show that those workers were indeed employees under the Act.

In looking at the first factor, the "degree of control" exercised over the workers, it is undisputed that Respondents controlled who would be sent to which client company and what they would be paid (**See** PX 3, No. 131, 135 and 136). Respondents transported workers to and from the placements, controlling when they arrived and when they could leave the client companies (**See** PX 3, No. 132). Further, most important for violations involving the nonpayment of overtime, they controlled the payment of the workers, issuing them checks after receipt of the validated work slips or invoices prepared by the Respondents (**See** PX 3, No. 130 and 133). They even attempted to specify the clothes these workers could wear. (TR 142) This degree of control is demonstrated by the memorandum to "All Workers" that was distributed to day workers. (PX 7) This memorandum specifies the time the workers must arrive at the offices of Alternative Staffing, the behavior that must be exhibited at the client companies and the footwear that must be worn by the workers.

In **Superior Care, Inc.**, a most relevant Second Circuit case, the defendant "engaged in the business of referring temporary health-care personnel, primarily nurses to individual patients, hospitals, nursing homes and other health care institutions". **Id.**, at 1057. The defendant claimed that these nurses were independent contractors and thus not covered as employees under the Act. The

Court, in discussing the "economic realities test" as applied to the nurses, held that "the totality of the circumstances reveals that as a matter of economic reality the nurses are employees." **Id.**, at 1061.

The Court, in discussing the factor of control, and while relating that the parties had stipulated that supervisory visits to the job sites were infrequent, held that even where direct supervision is minimal, "an employer does not need to look over his workers' shoulders every day in order to exercise control." **Id.**, at 1060. The nurses knew they were subject to review, just as the temporary workers in the present case know that they will need to submit an invoice form showing the requested hours were worked for the client company in order to receive any payment. **Id.** (**See** PX 3, No. 130). Further, unlike the **Superior Care** case, the workers in the present case are not performing skilled work that requires any considerable review. As described by the Director of Human Resources of one Respondents' major clients, Plastican, Inc., these workers typically perform unskilled "light assembly work" such as "putting a handle on a bucket". (PX 15 at 13) Due to the unskilled nature of this work, "...there's very little supervision. They're shown how to do the task, and they're, they're expected to do it, so, so there's really, I would say, no supervision". (PX 15 at 14)

Courts have also ruled in situations where individuals worked at home, away from supervision, that where an industry inherently requires such a lack of control, that factor should not be overemphasized in the "economic realities" analysis. **Donovan v. DialAmerica Marketing, Inc.**, 757 F.2d 1376, 1383-1384 (3rd Cir. 1985) **cert. denied** 474 U.S. 919 (1985) (Holding home researchers to be employees, regardless of the fact "that the defendant had very little control over the manner in which the home researchers did their work" and that "...the home researchers had the freedom to work at any time and for as many hours as they desired, and that they were not directly supervised by defendant." Due to the fact that lack of control "inheres in the very nature of home work" the control factor should not be overemphasized in the employment analysis.) **See Also Albrecht**, 802 F.Supp. at 1314 (Holding seamstresses working at home to be employees, regardless of a contract they signed which stated they were independent contractors.)

As in the home worker scenario, the analysis of the control factor in an employment relationship between a temporary employment agency and a worker should not be overemphasized. In sending the employee to a client company to perform work, there is a lack of direct supervision inherent in this type of industry. Furthermore, the agency in this case maintained tight control over who would be sent to which client, the hours they would remain there, the payment of the workers, and even the manner and dress of the

workers while at the client company.

The decision of the Board of Review of the Commonwealth of Massachusetts as to the employment status of these workers under the state's unemployment compensation statute is particularly illustrative of the control exercised by the defendants. According to the Board,

> ...Able-Temps recruits and screens the workers which it places. Clients contact Able-Temps and Able-Temps, alone, chooses the individual that it feels will satisfy the client's requirements. If a client expresses dissatisfaction with a worker, Able-Temps would refuse to offer the worker another assignment with that client. Workers are paid by Able-Temps at an hourly rate determined by Able-Temps. Clients are billed by Able-Temps and the individual receives no compensation directly from the client. Under these circumstances, it has not been shown the individuals are free from control and direction of Able-Temps in connection with the performance of their services...Able Temps does exercise control over the workers it places with clients.

In the Matter of Able-Temps, Inc., Decision of Board of Review, Appeal No. X-2041-A, at p. 4 (June 10, 1994).

The second factor in the analysis, the employee's "opportunity for profit or loss" and their investment in the business is clearly in the favor of a determination of employee status. These day workers received a fixed hourly rate, which was established by respondents (**See** PX 3, No. 135 and 136). They made no investment whatsoever in equipment or materials (TR 198). **See Lauritzen**, 835 F.2d at 1536-1537.

The third factor, "the degree of skill and independent initiative required to perform the work" is also clearly in favor of the conclusion that the workers were employees. It is undisputed that the day workers do not perform skilled labor for the client companies. (**See** PX 3, No. 128) As stated by Marlene Woods in her deposition of May 3, 1995, "...if they're sober and they're breathing and want to go to work, I want them to go to work. They're hired. They're asked to work." (PX 2 at 46) (**See Also** the Deposition of William Woods, where he describes negotiations with client companies by stating "Well, to put it crudely, you know, do you want to use our people to unload your trucks, and how much will you pay us for this service?" (PX 1 at 50))

Further, the memorandum attached to several of the contractors agreements, provided by respondents in discovery, clearly shows that the workers not only are not required to use independent initiative, they are not allowed to do so. (**See** PX 7, stating "Do not contact companies on your own. We will schedule work: that is not your job. If you contact a company directly, you will not be sent out again.").

It is noteworthy that the court in **Superior Care**, 840 F.2d at 1060, ruled that the temporary nurses were employees even though "the nurses are skilled workers who require several years of specialized training." The court further stated that "the fact that workers are skilled is not itself indicative of independent contractor status. A variety of skilled workers who do not exercise significant initiative in locating work opportunities have been held to be employees under the FLSA."

As to the fourth factor of the analysis, the "permanence" or "duration of the working relationship", while a large number of these workers are transient since it is the nature of the temporary employment business to have a transient work force, a number of dayworkers have worked for the respondents' various temporary employment businesses for as long as three to four years at a time. (PX 2 at 16-17)

Further, recent cases have held that where work forces are deemed transient due to operational characteristics intrinsic to the industry rather than to the workers' own business initiative, these transient workers may still be deemed to be employees rather than independent contractors. **See Mr. W. Fireworks, Inc.**, 814 F.2d at 1053-1054 (Holding operators of firework stands to be employees, notwithstanding the 80% turnover rate due to the seasonal nature of the work.); **See Also Superior Care**, 840 F.2d at 1060-1061 (In holding the temporary nurses to be employees, notwithstanding a 90% turnover rate during a 3 year period, the court stated, "the fact that these nurses are a transient work force reflects the nature of their profession and not their success in marketing their skills independently.")

Finally, the fifth and last factor, "the extent to which the work is an integral part of the employer's business", is also clearly in the favor of a determination of employment. Temporary employment is the defendants' business. Their profit depends upon their placement of these workers. (**See** PX 3 at 134). Further, the product they offer their clients is the services of workers without the bother or expense of complying with state and federal employment laws. As stated by the New Hampshire Supreme Court in the case which litigated the employment status of the workers of Work-A-Day of New Hampshire, Inc., a predecessor corporation of the Respondents,

> Work-A-Day advertises its service of placing temporary workers in a brochure which Work-A-Day mails to various companies in the State. In the brochure, Work-A-Day assures its prospective client-companies that it will take care of up to 90% of the bookkeeping, and that the clients will never have to worry about paying workers' compensation, health insurance, or deducting social security from the workers' wages if the clients take advantage of Work-A-Day's placement service.

Appeal of Work-A-Day of Nashua, Inc., 564 A.2d at 446.

As late as Spring of 1993, the Respondents advertised in a Plastics Industry Supplement of the Sentinel and Enterprise in Fitchburg, Massachusetts that they would "handle all the burden some paperwork, bookkeeping, record keeping, payroll costs, and government reporting". (PX 4) The Director of Human Resources of Plastican, a plastics manufacturer in the Fitchburg/Leominster area, who utilized the Respondents' services during the spring of 1993, testified that it was her "understanding that...they would comply with all of the requirements dealing with labor". (PX 15 at 4, 5, and 17)

In looking at the "totality of the circumstances", "as a matter of economic reality", these workers "depend upon someone else's business for the opportunity to render service." **See Superior Care**, 840 F.2d at 1059. They are clearly not independent contractors. Whether they are to be considered employees of the Respondents, employees of the client companies, or jointly employed by both, they clearly are employees under the Act, and should have been paid time and a half their regular rate of pay for all hours worked over 40 per week. The respondents advertised to these client companies that they would be responsible for the payroll, paperwork and government reporting. They should be estopped from attempting now to avoid that responsibility by either classifying these workers as independent contractors or shifting the blame to the client companies.[4]

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[4] At least one of the competitors of the Respondents advertise that they treat their temporary workers as employees. As stated in one of the competitor's brochures mistakenly provided by the Respondents in their discovery response,

> ...figures, taken from the most recent United States Chamber of Commerce survey, show that the average "fringes" as a percentage of payroll for all companies is 36.7%. When you call in All Temps, Inc...you have none of

these expenses or responsibilities because we are the employer. (PX 16)

II. THE INDIVIDUAL RESPONDENTS ARE EMPLOYERS UNDER THE ACT

The named individual Respondents each had operational control of Alternative Staffing and therefore should be held jointly liable along with the employing corporations for violations of the Act. **See** **Sabine Irrigation**, 695 F.2d at 196.

William Woods, by his own admission, personally formed, owned and operated the sequence of temporary employment agencies, two of which are the corporations named in this proceeding. (PX 8 at 1, and PX 1 at 48) At his bidding, a number of the members of his family became involved in this temporary employment business. (PX 8 at 1)

Marlene Woods, the wife of William Woods, ran the Fitchburg location of Able Temps, Alternative Staffing, and All American Temps. (PX 2 at 6, 24 and 29) She hired, fired, and supervised the employees at that location. (PX 2 at 7, 15-18)

Harold Woods, the son of William Woods, as president, treasurer and director of Alternative Staffing, Inc., was involved extensively in the corporation's formation (PX 5), as well as the business dealings such as setting up bank accounts, filing papers, answering phones, sales, recruitment of clients, placement of workers and payment of workers. (TR at 136, 246-247) He also transported workers to the job sites. (TR at 247)

Ann Woods, the sister of William Woods, was the listed president of Baystate Alternative Staffing, and Able Temps Referrals, Inc. As president of Able-Temps, Ms. Woods signed the 1990 stipulation with the Wage and Hour Office. In the present litigation as well, Ms. Woods acted for all of the Respondents in signing the "Defendant's Response to Plaintiff's Request for Admissions". She also handled some bookkeeping duties as well as placement of workers. (TR at 135)

It is clear that William Woods, as well as Marlene, Harold and Ann Woods, acting at the direction of William Woods, controlled the operations of Able-Temps and Alternative Staffing. Therefore, these individuals are employers under the Act and shall be held jointly liable along with those corporations for violations of the Act. **Id.** It is further clear from the totality of the testimony in this case that unless these family members are held accountable in this proceeding the assets of this business will simply turn up in their hands rather than in William Woods' hands. In addition to the factors discussed in the case law, William Woods has shown an affinity for playing shell games with phony corporations and using family members as corporate officers who simply follow his orders, usually without even knowing or caring that they've been listed as officers of such paper companies as Plato Management. (PX 2 at 64-65)

III. THE RESPONDENTS ACTED WITH RECKLESS DISREGARD FOR THE REQUIREMENTS OF THE ACT, AND THE IMPOSITION OF THE CALCULATED CIVIL MONEY PENALTY UNDER THE WILLFUL STANDARD IS APPROPRIATE

The Respondents clearly showed knowledge of and reckless disregard for the requirements of the Act for the following reasons.

This was not the first time the issue of the classification of these workers as "employees" had arisen for the respondents. As detailed earlier, the Respondents had been involved in litigation involving the classification of these employees for purposes of the state unemployment compensation statutes in both New Hampshire and Massachusetts as early as 1989. In all of these proceedings the courts have held that the temporary workers at issue were employees and not independent contractors. Respondents had knowledge of the doubtful legality of those actions from the New Hampshire and Massachusetts litigation as early as 1989.

Respondents further showed reckless disregard for the requirements of the Act through their attempts to keep the Department of Labor from obtaining payroll records of the day workers from 1990 through January, 1994, their actions and practices directly contrary to advice given them by a Wage and Hour investigator in 1990, and their failure to attempt to come into compliance until July of 1994.

In 1990, investigator William Pickett requested payroll information as to all employees of the Respondents, specifically requesting payroll records and time sheets of all temporary employees. (TR at 51) While the Respondents produced records for the "in-house" employees, which showed compliance with the overtime portions of the Act, no time records were produced for the temporary workers. (PX 11; TR 52, 59, 60, 61 and 65) As a result of this lack of records, combined with the lack of interview responses received due to faulty addresses, Mr. Pickett was unable to determine whether Respondents were in compliance with the overtime requirements of the Act. (TR 60, 62-63) He informed the Respondents that it was necessary to keep records on **all employees**, not just the "in-house" employees, and was clear in stating to the Respondents that "employees" included the temporary workers. (TR 65). The Respondents entered into a stipulation with the Department of Labor, agreeing to comply with Sections 6, 7 and 11 of the Act in the future. (PX 3, No. 100 and 101)

It is apparent from admissions of the Respondents in their depositions that records of the hours of work and rates of pay of temporary workers did in fact exist at the time Mr. Pickett requested them. (PX 1 at 30-31, PX 2 at 62-63) The Plaintiff submits that these documents were purposefully withheld by the Respondents so that no overtime violations could be substantiated.

With no overtime violations found, the Respondents could resolve the matter merely by entering into the stipulation of compliance with the Wage and Hour Department rather than paying backwages owed to the day workers. After entering into this stipulation, the Respondents then made no change in their practice of not paying these workers for hours worked over forty per week.

The Respondents have made several arguments in support of their position that their actions were not willful. First, they contend that since they did not meet directly with Mr. Pickett, choosing instead to hire representatives to deal with the investigation, they themselves had no knowledge of the requirements of the Act regarding the employment status of these workers. It is their contention that they believed the stipulation applied only to the "in house" workers. (TR 173-174)

Mr. Pickett met solely with Attorney Walsh during the prior investigation, as Mr. Walsh had indicated to him that he should not contact the clients directly, and should go through him if he had questions of the Respondents. (TR 339) Case law is clear that "each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney'." **Link v. Wabash Railroad Company**, 370 U.S. 626, 634 (1962); **See Also** **Levin v. Berley**, 728 F.2d 551, 553 (1st Cir. 1984) (stating "...a client is charged with the knowledge of his attorney.");

Mr. Pickett is certain that the "in house" workers were not discussed in the first investigation after his first meeting with Attorney Walsh, because the Respondents were already in compliance with respect to these workers. (TR 51, 59, and 65) Mr. Pickett spent considerable time explaining the Department's position on the temporary workers to Attorney Walsh. He gave him a Department of Labor publication which clearly laid out Wage and Hour's position as to the treatment of temporary workers under the Act. (PX 20) While Attorney Walsh believed the wording of the stipulation "was without prejudice to certain positions that Able had taken with respect to violations of the law" (TR 289), he does not dispute the fact that he knew that the Department of Labor's position was that the temporary workers were employees under the Act and should be paid appropriate overtime for hours worked over 40 per week. (TR 283) Respondents hired Attorney Walsh to represent them during this investigation, and are chargeable with the knowledge conveyed to Attorney Walsh by Mr. Pickett. **See Wabash**, 370 U.S. at 634 and **Berley**, 728 F.2d at 553.

During Mr. Pickett's second investigation in 1992, Respondents continued to withhold records for almost a year and a half. Mr. Pickett first attempted to obtain the payroll records of these temporary workers in September of 1992. (PX 3, No. 108) The Secretary was forced to file a "Motion to Enforce Subpoena Duces

Tecum" with the Federal District Court and notify the respondents of plans to file a contempt action on U.S. District Judge Gorton's order granting that motion, in order to get the Respondents to produce those records. (PX 3, No. 114, 118, 119, and 122) The Respondents' willful actions in 1990, 1992 and 1993 allowed the respondents to keep the Department of Labor from discovering back wage violations until January of 1994.

William Woods also argues that Respondents' actions were not willful since Attorney Robert Holden, now deceased, gave him advice that these workers should be classified as independent contractors for income tax purposes.

The advice of Attorney Holden is suspect at best. Attorney Holden had been William Woods's family attorney for at least 35 years. (TR 193) Attorney Holden had set up for him a company called Masterson Corporation. (TR 191) As stated by District Judge Mazzone, in a slip opinion dated April 10, 1980, Mr. Woods was the main player in an attempt, through Masterson Corporation, "to conceive, execute, and conceal a fraudulent purchase order scheme." **United States v. Peter Canessa, et al**, Criminal Action No. 79-0017-MA, Slip Opinion, April 10, 1980, p. 3, **aff'd**, **U.S. v. Ciampaglia, Woods, Canessa, and Gintner, Bancroft, and McNiff**, 628 F.2d 632 (1st Cir. 1980), **cert. denied** 101 S.Ct. 365. Although this scheme "derived mainly from ...William Woods", Attorney Holden did not make Mr. Woods a corporate officer of Masterson Corporation. **Id.** (**See also** TR at 180)

This pattern continued in 1983 when Woods met with Attorney Holden to form the temporary help agencies involved in this case. Attorney Holden set up a number of corporations, including Able Temps, Work-A-Day of Fitchburg, Work-A-Day of Worcester, Work-A-Day of Nashua and Alternative Staffing. (TR 193). Attorney Holden, though knowing about Woods's criminal conviction, and knowing that Woods would be running all of these corporations, set up the corporations listing Woods's relatives as corporate officers and excluding William Woods from all corporate documents. (TR 194; PX 3, No.'s 1-3, 6, 8, 9, 15, 18, 19, 21-23, 26-27, 30-32, 40-42, 71-76)

William Woods and Attorney Holden went further to hide the business's real ownership, setting up paper corporations, Plato Merchandising and Galactic Management, as managing agents of the business. (TR 178-179) In response to Complainant's Request Numbers 64 through 70 which refer to William and Marlene Woods's control of payroll, recordkeeping, hiring and firing and general business operations of the corporations, Respondents denied that William and Marlene Woods controlled and directed these corporations, alleging instead that "...the business affairs of Able were managed under contract with Plato Merchandising Corp.," and "...the business affairs of Alternative were managed under a

contract with an entity known as Galactic Management, Inc." (PX 3, Res. No.'s 58 and 61).

Marlene Woods, the named president of Plato Merchandising Corporation, was asked about her role as president during her deposition. (PX 2 at 64-65) According to Marlene Woods, she may have been named as president but she never did anything other than receive a paycheck. (PX 2 at 65) William Woods admitted in his deposition that he ran Plato Merchandising Company. (PX 1 at 57) As was the usual practice of Robert Holden and William Woods, Woods's name was conspicuously absent from corporate documents.

Over the last 15 years, William Woods ran between 15 and 20 corporations, mainly set up by Attorney Holden; Woods's name did not appear on any of the corporate documents. The Plaintiff contends that any "advice" given to William Woods by Attorney Holden was highly suspect because of that pattern of past practice.

Further, since Attorney Holden is no longer alive, he can not be cross-examined as to what version of the facts he was given prior to giving any "advice" about the status of these workers for income tax purposes. Respondents' version of facts often edits out or even changes extremely relevant information. For instance, William Woods stated that he really didn't know if he told Attorney Holden that the unemployment litigation in New Hampshire ruled against them, since he "didn't attach that much importance to it". (TR 199)[5]

The regulations state "an employer's conduct shall be deemed to be in reckless disregard of the requirements of the Act,..if the employer should have inquired further into whether its conduct was in compliance with the Act, and failed to make adequate further inquiry." (29 CFR §578.3(c)(3))

The Respondents in this case clearly did not make adequate further inquiry. They knew as early as 1989 that there was a question as to the legality of their classification of the workers

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[5] Indeed the respondents misrepresented the outcome of **Work-A-Day of Fitchburg, Inc. v. Commissioner of the Department of Employment and Training**, Case. No. 9016-CV-0147 (May 6, 1992) to the Wage and Hour Department in their statement of April 16, 1993, refusing to comply with Wage and Hour's subpoena (PX 3). In that statement, the respondents described this case as ruling that the "individuals involved were not employees". As stated earlier in this brief, this case actually held the opposite. That court ruled that the workers were employees. The question they remanded back to the Board was whether those workers were employees of the respondents, the respondents' clients, or both the respondents and the respondents' clients Id., at 4.

as independent contractors from the New Hampshire case. The "advice" of Attorney Holden was in relation to an income tax matter they were involved with concurrently with the Wage and Hour cases. The Respondents do not claim to have asked Holden his advice as to the workers' status for purposes of the Fair Labor Standards Act, and in fact avoided telling Holden about the New Hampshire litigation when he rendered his "opinion" in the IRS matter.

Plaintiff essentially submits that the Respondents showed reckless disregard in that they and their agents failed utterly to make adequate good faith inquiries as to the legality of their actions.

The Plaintiff further contends that the Respondents knew their actions were contrary to the Act. The regulations state that "an employer's conduct shall be deemed knowing, among other situations, if the employer received advice from a responsible official of the Wage and Hour Division to the effect that the conduct in question is not lawful." In this regard, **see** 29 CFR §578.3(c)(2). The Respondents received this advice from investigator Pickett and were given a pamphlet outlining the position of the Wage and Hour Department as to the employment status of these workers in 1990. They were given this advice a second time by Mr. Pickett in the 1992 investigation. However the Respondents waited until July of 1994 to begin compliance with the Act. Respondents agent Walsh, who was selected by Respondents to negotiate with the Department, admits that he understood the Department's position (TR 283), and yet describes no efforts whatsoever to research the validity of the position Respondents were asserting. There can be no question that at the very least Respondents' continuing noncompliance during their defiance of Judge Gorton's Order constitutes "reckless disregard" under **Richland Shoe**, 486 U.S. at 1681. **See Also Superior Care**, 840 F.2d at 1062 (Temporary nursing agency held to show reckless disregard for Act where compliance officer advised them in an earlier investigation that their temporary workers were employees rather than independent contractors).

The Administrator, in assessing the penalty for these willful violations, considered both the size and seriousness of these violations, as well as the firm's efforts to comply, the prior history of the firm, its prior stipulation, the number of employees affected, the pattern of the violations, their commitment for future compliance and their cooperation during the investigation. (TR 124)

The Respondents obtained a substantial monetary benefit from their illegal payment practices. They advertised to their clients as late as Spring of 1993 that they could save money since the Respondents would handle "all the burden some paperwork, bookkeeping, record keeping, payroll costs, and government reporting." (PX 4) In reality, they handled this burden by

classifying these workers, in reckless disregard of the law, as independent contractors. They were able to profit substantially by usually charging their clients between $7.00 and $7.50 per hour per worker for their service and paying the day workers usually only the minimum wage. (PX 2 at 54) Scott Valentine of the Litigation Support Office, using the data provided by the Respondents, was able to calculate that at least 4199 day workers worked a total of 974,115 hours for the Respondents during the period between September 30, 1991 and July 3, 1994, and were paid out a total of $4,366,285.50 (**See** PX 6 (Stipulated to by the Respondents)) Plaintiff further submits that, considering an approximated $3.00 to $3.50 premium per worker per hour, the Respondents certainly profited substantially from holding themselves out as they did in their advertisements.

Further, by ignoring the clear instructions of the Wage and Hour Division not only for the two years preceding the second investigation but for almost two years following it, the Respondents denied proper pay to more than six hundred of their employees by not paying them overtime compensation due under the Act, bringing about a calculated backwage liability of $142,409.16 for the period between September 30, 1991 and July 3, 1994. (**See** PX 6 and Stipulation of the Parties) These calculations show both the seriousness of these violations and the size of the business of the Respondents.

The original calculation of penalties was done in April of 1994. The Department used a standard form which took into consideration the number of employees paid in violation, the willfulness of the violation, and the employer's refusal to come into compliance, to calculate originally a penalty of $240,000.00. (**See** PX 10)[6] In consideration of the nature of the temporary employment business which tends to result in a large number of employees being effected, the Administrator, in consultation with the Solicitor's Office, reduced the penalty to $150,000.00. (TR 127-128) It was determined from looking at the size of the company, the profit margin per employee and annual dollar volume, the seriousness of the violation, and the company's refusal to come into compliance that this penalty was appropriate. (TR 127-128)

In determining whether an individual is an employee under the Act, the ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the

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[6] It is noted that updated backwage information has more than doubled the number of employees effected, but the Secretary has not sought to increase the amount of penalty assessed, as the parties have agreed to extend the period covered by this administrative case without increasing the penalty (See Motion filed on May 15, 1995).

opportunity to render service or are in business for themselves." **Superior Care**, 840 F.2d at 1058-1059. One need only look to the words of William Woods in his deposition to see that the day workers in this case were employees of the Respondents. As stated

by Mr. Woods, "...to put it crudely, you know, do you want to use our people to unload your trucks, and how much will you pay us for this service?". (PX 1 at 50)

The Respondents willfully violated Sections 7 and 11 of the Act. They have known since 1989 that what they were selling their clients was an illegal scheme to violate state and federal labor laws. Their attorney admitted that he had been told in a previous investigation by Mr. Pickett that the Department's position was that these workers were to be treated as employees under the Act. They have profited substantially from this practice.

The civil money penalties assessed are appropriate and should be imposed as a deterrent to these employers and to future potential violators. **See** 57 Fed. Reg. 49128 (1992) (quoting House Report No. 101-260, p.25, September 26, 1989).

This Administrative Law Judge, in reaching the ultimate conclusions in the matter before me must keep in mind certain well-settled legal principles which form the foundation for the FLSA and its passage by Congress.

The FLSA is intended to secure for workers the fruits of their toil and exertion. **Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 125**, 321 U.S. 590, 64 S.Ct. 698 (1944). This chapter is comprehensive, having the special purpose of covering all workers in commerce or production of goods for commerce except those specifically exempted and its remedial purposes should be liberally construed and its exemptions to coverage narrowly construed. **Waialua Agr. Co. v. Ciroco Maneja**, 77 F.Supp. 480 (D.C. Hawaii 1948), **remanded on other grounds**, 178 F.2d 603 (9th Cir. 1949), **cert. denied**, 339 U.S. 920, 70 S.Ct. 622 (1950). This chapter was designed to protect the laboring public generally against the practices which it outlaws. **Fleming v. Tidewater Optical Co.**, 35 F. Supp. 1015 (D.C. VA. 1940).

It is now well-settled that the FLSA is construed liberally to apply to the furthest reaches consistent with congressional direction. **Mitchell v. Lublin, McGaughy & Associates**, 358 U.S. 207, 79 S.Ct. 260 (1959). This chapter is to be given a liberal construction. **Dunlop v. Asby**, 555 F.2d 1228 (5th Cir. 1977), **H.B. Zachary Co. v. Mitchell**, 262 F.2d 546 (5th Cir. 1959), **aff'd**, 362 U.S. 310, 80 S.Ct. 739 (1960). This chapter is remedial and calls for a liberal construction. **Richter v. Barrett**, 173 F.2d 320 (3d Cir. 1949). This chapter is remedial and, having a humanitarian purpose in view, is to be liberally construed in respect of coverage. **McComb v. Farmers Reservoir & Irr. Co.**, 167 F.2d 911 (10th Cir. 1948), **aff'd**, 337 U.S. 755, 69 S.Ct. 1274 (1949), **rehearing denied**, 336 U.S. 839, 70 S.Ct. 31 (1949). This chapter is remedial and must be given a liberal construction with its manifest intent and purpose in view. **Walling, Administrator, v.**

Rutherford Food Corp., 156 F.2d 513 (10th Cir. 1946), **aff'd in part, modified in part on other grounds**, 331 U.S. 722, 67 S.Ct. 1473 (1947).

This chapter is social legislation to be liberally construed so as to effect broad coverage, **Wirtz v. Ti Ti Peat Humus**, 249 F.Supp. 166 (D.C. S.C. 1966), **reversed on other grounds and remanded**, 373 F.2d 209 (4th Cir. 1967), **cert. denied**, 389 U.S. 834, 88 S.Ct. 37 (1967), and to accomplish the declared policy of Congress. **Coomer v. Durham**, 93 F.Supp. 526 (D.C. Va. 1950). A liberal construction of this chapter is imperative, **Blankenship v. Western Union Tel. Co.**, 67 F.Supp. 265 (D.C. W.VA. 1946), **aff'd**, 161 F.2d 168 (4th Cir. 1947), and Congress meant to include all employees not expressly excepted. **J.J. Rose Truck Line v. Ross**, 442 S.W.2d 483 (Tex. Civ. App. 1969), **rehearing denied**, (May 28, 1969). Doubt is resolved in favor of coverage of employees by this chapter, **Mitchell v. S.A. Healy Co.**, 190 F.Supp. 897 (D.C. Ill. 1959), **rev'd on other grounds**, 284 F.2d 39 (7th Cir. 1960), and this chapter should be strictly construed in favor of the employee. **Edwards v. Riverside Products Co.**, 85 F.Supp. 290 (D.C. W.VA. 1949).

FLSA must be construed liberally to effectuate broad policies and the intentions of Congress, **Fegley v. Higgins**, 19 F.3d 112 (6th Cir. 1994), and in such a way as to apply to the furthest reaches consistent with congressional direction. **Biggs v. Wilson**, 1 F.3d 1537 (9th Cir. 1993); **Donovan v. Sabine Irr. Co.**, 695 F.2d 190 (5th Cir. 1983), **cert. denied**, 463 U.S. 1207, 103 S.Ct. 3537 (1983), **rehearing denied**, 463 U.S. 1249, 104 S.Ct. 37 (1983). Courts should construe exemptions to the FLSA narrowly and the employer has the burden of proof establishing entitlement to an exemption, **Brock v. Mr. W Fireworks, Inc.**, 889 F.2d 543 (5th Cir. 1989), **cert. Denied**, 495 U.S. 929, 110 S.Ct. 2167 (1990), and exceptions under the FLSA are to be narrowly construed against the employer asserting them, **Luther v. Z. Wilson, Inc.**, 528 F.Supp. 1166 (D.C. Ohio 1981), in furtherance of Congress' role of providing broad federal employment protection. **Hurley v. State of Oregon**, 859 F.Supp. 427 (D. Or. 1993), **rev'd on other grounds**, 27 F.3d 392 (9th Cir. 1994).

It would be contrary to congressional intent to permit an employer who exercises substantial control over a worker, but whose hiring decisions occasionally may be subjected to a third party's veto, to escape compliance with this chapter. **Carter v. Dutchess Community College**, 735 F.2d 8 (2d Cir. 1984). The FLSA serves both a public and a private purpose; its enforcement provisions are intended to protect workers and their families, whom this chapter is intended to benefit, but it is also intended to protect those employers who comply with its terms. **Lerwill v. Inflight Services, Inc.**, 3797 F.Supp. 690 (D.C. Cal. 1974).

An employee cannot contract with an employer to accept wage payments which to not conform to the standard requirement of this chapter, **Wirtz v. William H. LaDew of Louisiana, Inc.**, 282 F.Supp. 742 (D.C. La. 1968), and an employer and its employees cannot by contract or by understanding limit the scope and effect of this chapter. **Kappler v. Republic Pictures Corp.**, 59 F.Supp. 112 (D.C. Iowa 1945), **aff'd**, 151 F.2d 543 (8th Cir. 1945), **aff'd**, 327 U.S. 757, 66 S.Ct. 523 (1946), **rehearing denied**, 327 U.S. 817, 66 S.Ct. 804 (1946). Congress, in adopting this chapter, intended to achieve a national uniform policy of guaranteeing compensation for all work or employment engaged in by all employees covered by this chapter, and any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights. **Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America**, 325 U.S. 161, 65 S.Ct. 1063 (1045), **rehearing denied**, 325 U.S. 897, 65 S.Ct. 1550 (1945). For example, a railroad station janitor was entitled to recover compensation and damages under the FLSA **notwithstanding** a written agreement at lower wages designated him as an independent contractor. **Hargis v. Wabash R. Co.**, 163 F.2d 608 (7th Cir. 1947) Moreover, the FLSA does not by its terms exclude temporary workers from its coverage. **Mitchell v. Feinberg**, 123 F.Supp. 899 (D.C. N.Y. 1954), **modified on other grounds**, 236 F.2d 9 (2d Cir. 1956), **cert. denied**, 352 U.S. 943, 77 S.Ct. 266 (1956).

Welders are "employees" within the FLSA and, thus, are entitled to overtime compensation for work performed in excess of 40 hours in any week, notwithstanding that they signed contracts stating that they were independent contractors, furnished their own equipment, provided their own insurance coverage, listed themselves as self-employed on their tax returns, had their own business cards and letterheads, and were paid a higher hourly wage than welders considered to be employees, where from looking at the economic realities of relationship it was apparent that they were economically dependent upon the alleged employer. **Robicheaux v. Radcliff Material, Inc.**, 697 F.2d 662 (5th Cir. 1983).

During the 1990 investigation Investigator Pickett gave to the Respondents WH Publication 1297, entitled **Employment Relationship Under the Fair Labor Standards Act**, a document in evidence as PX 20. In pertinent part this document states as follow (PX 20):

"The Fair Labor Standards Act contains provisions and standards concerning recordkeeping, minimum wages, overtime pay and child labor. These basic requirements apply to employees engaged in interstate commerce or in the production of goods for interstate commerce and also to employees in certain enterprises which are so engaged. Federal employees are also subject to the recordkeeping, minimum wage, overtime, and child labor provisions of the Act. Employees of State and local government are subject to the same

provisions, unless they are engaged in traditional governmental activities, in which case they are subject to the recordkeeping and child labor requirements. The law provides some specific exemptions from its requirements as to employees employed by certain establishments and in certain occupations.

"For the Fair Labor Standards Act to apply to a person engaged in work which is covered by the Act, an employer-employee relationship must exist. The purpose of this publication is to discuss in general terms the latter requirement.

"**If you have specific questions about the statutory requirements, contact the W-H Division's nearest office. Give detailed information bearing on your problem since coverage and exemptions depend upon the facts in each case**. (Emphasis added)

"STATUTORY DEFINITIONS

"Employment relationship requires an "employer" and an "employee" and the act or condition of employment. The Act defines the terms "employer", "employee", and "employ" as follows:

"Employer" includes any person acting directly or indirectly in the interest of an employer in relation to an employee and includes a public agency, but does not include any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. Section 3(d).

(1) Except as provided in paragraphs (2) and (3), the term "employee" means any individual employed by an employer. . .

TEST OF THE EMPLOYMENT RELATION

The Supreme Court has said that there is "no definition that solves all problems as to the limitations of the employer-employee relationship" under the Act; it has also said that determination of the relation cannot be based on "isolated factors" or upon a single characteristic or "technical concepts", but depends "upon the circumstances of the whole activity" including the underlying "economic reality". In general an employee, as distinguished from an independent contractor who is engaged in a business of his own, is one who "follows the usual path of an employee" and is dependent on the business which he serves. The factors which the Supreme Court has considered significant, although no single one is regarded as controlling, are:

> (1) the extent to which the services in question are an integral part of the employer's business;
>
> (2) the permanency of the relationship;

> (3) the amount of the alleged contractor's investment in facilities and equipment;
>
> (4) the nature and degree of control by the principal;
>
> (5) the alleged contractor's opportunities for profit and loss; and
>
> (6) the amount of initiative, judgment, or foresight in open market competition with others required for the success of the claimed independent enterprise. . .

FACTORS WHICH ARE NOT MATERIAL

There are certain factors which are immaterial in determining whether there is an employment relationship. Such facts as the place where the work is performed, the absence of a formal employment agreement and whether the alleged independent contractor is licensed by the State or local government are not considered to have a bearing on determinations as to whether or not there is an employment relationship. Similarly, whether a worker is paid by the piece, by the job, partly or entirely by tips, on a percentage basis, by commissions or by any other method is immaterial. The Supreme Court has held that the time or mode of compensation does not control the determination of employee status.

EFFECT OF EMPLOYMENT RELATIONSHIP

Once it is determined that one who is reputedly an independent contractor is in fact an employee, then all the employees of the co-called independent contractor engaged in the work for the principal employer likewise become the employees of the principal employer, who is responsible for compliance with the Act. However, in order to protect himself against the "hot goods" prohibition of the Act, a manufacturer or producer should undertake to see that even a true independent contractor complies with the law. . ." (PX 20)

As noted above, the six-factor test developed by the Wage and Hour Division of the Department of Labor to determine whether workers are employees for purposes of the FLSA is the totality of the circumstances test and it is not necessary that all six criteria be met to preclude a determination that the workers are employees. **Reich v. Parker Fire Protection District**, 992 F.2d 1023 (10th Cir. 1993). Whether an employment relationship exists under the FLSA depends on the economic reality of employment situation, and whether alleged employer had power to hire and fire employees, supervise and control employee work schedules or conditions of

employment, determine rate and method of payment, and maintain employment records. **Hale v. State of Arizona**, 967 F.2d 1356 (9th Cir. 1992), **aff'd on rehearing en banc**, 993 F.2d 1387 (1993).

The ultimate conclusion that an individual is an "employee" within the meaning of this section is a legal determination rather than a factual one. **Castillo v. Givens**, 704 F.2d 181 (5th Cir. 1983), **cert. denied**, 464 U.S. 850, 104 S.Ct. 160 (1983). Among the factors which are useful in distinguishing employees from independent contractors for purposes of social legislation such as this chapter are: degree of the alleged employer's right to control the manner in which the work is to be performed; alleged employee's opportunity for profit or loss depending upon his/her managerial skills; alleged employee's investment in equipment or materials required for this task, or his employment of helpers; whether the service rendered requires special skill; degree of permanence of the working relationship; and whether the service rendered is an integral part of the alleged employer's business. **Real v. Driscoll Strawberry Associates**, 603 F.2d 748 (9th Cir. 1979); **Aviles v. Kunkle**, 765 F. Supp. 358 (S.D. Texas 1991); **Wagner v. Career Opportunities, Inc.**, 602 F. Supp. 887 (D.C. Tenn. 1984); **Donovan v. Gillmor**, 535 F. Supp. 154 (D.C. Ohio 1982), **appeal dismissed**, 708 F.2d 723 (6th Cir. 1982).

Under FLSA, the definition of "employee" is broad; when determining whether an individual is an "employee" or "independent contractor," the Court is not restricted to common-law concepts, **Baker v. Barnard Construction Company**, 860 F. Supp. 766 (D. N.M. 1994), and the test is whether the worker is an employee as a matter of economic reality. **Hageman v. Park West Gardens**, 480 N.W. 2d 223 (N.D. 1992). Under the "economic reality" test of determining employee status under FLSA, the court inquires whether alleged employer has power to hire and fire the employees, supervises and controls employee work schedules or conditions of employment, determines rate and method of payment, and maintains employment records. **Watson v. Graves**, 909 F.2d 1549 (5th Cir. 1990); **Martin v. State of Wyoming**, 770 F. Supp. 612 (D. Wyo. 1991); **Griffin v. Daniel**, 768 F. Supp. 532 (W.D. Va. 1991); **Donovan v. American Airlines**, 514 F. Supp. 526 (D.C. Tex. 1981), **aff'd**, 686 F.2d 276 (5th Cir. 1982). Under FLSA, determining the degree of control of alleged employer over a work is only an aid to be used to gauge degree of dependence of alleged employees on business with which they are concerned, and is not an end in and of itself. **Hageman**, **supra**.

The essential factor in determining application of this chapter is whether there is an employment relationship. **Mitchell v. Whitaker House Co-op, Inc.**, 275 F.2d 362 (1st Cir. 1969), **rev'd on other grounds**, 366 U.S. 28, 81 S.Ct. 933 (1961). The application of this chapter depends upon the character of the employee's work, and not upon the nature of the employer's activities. **Schroepfer v. A.S. Abell Co.**, 138 F.2d 111 (4th Cir. 1943), **cert. denied**, 321 U.S. 763, 64 S.Ct. 486 (1944), **rehearing denied**, 322 U.S. 770, 64 S.Ct. 1149 (1944).

On the basis of the totality of this closed record and having in mind the humanitarian and remedial statute and having considered the excellent briefs submitted by the parties in support of their respective positions, and having accepted and adopted certain findings and conclusions and having rejected other findings and conclusions, I now make the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Respondent William Woods formed and operated a temporary employment business, which included approximately ten corporations in Massachusetts and New Hampshire, operating both concurrently and consecutively over the last twelve to thirteen years. (PX 1, Deposition of William Woods and PX 8, Affidavit of William Woods)

2. Respondent William Woods was convicted of mail fraud in 1979. (**U.S. v. Ciampaglia, Woods, Canessa, and Gintner, Bancroft and McNiff**, 628 F.2d 632 (1st Cir. 1980)

3. Respondent William Woods believed he might have trouble getting a registration or a permit to run a temporary agency because of his criminal conviction. (TR 194)

4. Attorney Robert Holden, acting in conjunction with respondent William Woods, set up all of the temporary employment agencies. (TR 194)

5. Respondent William Woods was not listed as a corporate officer of any of the temporary agencies. (TR 194)

6. Respondent Baystate Alternative Staffing, Inc. was incorporated in Massachusetts on July 7, 1992. (PX 3)

7. The president of Baystate Alternative Staffing, Inc. was respondent Ann F. Woods. (PX 3)

8. Ann F. Woods is the sister of William Woods. (PX 3)

9. The treasurer and clerk of Baystate Alternative Staffing, Inc. was Harold Woods. (PX 3)

10. Harold Woods is the son of William Woods. (PX 3)

11. Baystate Alternative Staffing, Inc. was a shell corporation which did not conduct any business. (PX 3)

12. Respondent Able Temps Referrals, Inc. was incorporated in Massachusetts on December 15, 1988. (PX 3)

13. The president of Able Temps Referrals Inc. was Ann F. Woods. (PX 3)

14. The registered agent of Able Temps Referrals was Michael McKinney. (PX 3)

15. Michael McKinney is the son-in-law of Marlene Woods, and Marlene Woods is the wife of William Woods. (PX 3)

16. The treasurer of Able Temps Referrals was Cinda Wagner Pittman. (PX 3)

17. Cinda Wagner Pittman is the daughter of Marlene Woods. (PX 3)

18. Able Temps Referrals ceased doing business in September of 1991. (PX 3)

19. At the request of William Woods, on or about September of 1991, Respondent Harold Woods, aided by Attorney Robert Holden attempted to incorporate Alternative Staffing, Inc. (PX 5, Affidavit of Harold Woods)

20. Alternative Staffing, Inc. was not formally incorporated until June of 1994. (PX 5, Affidavit of Harold Woods)

21. Alternative Staffing, Inc. ceased doing business in July of 1994. (PX 3)

22. Harold Woods was the president, treasurer and director of Alternative Staffing, Inc. (PX 3)

23. Ann F. Woods was the clerk and director of Alternative Staffing, Inc. (PX 3)

24. Michael McKinney was the director of Alternative Staffing, Inc. (PX 3)

25. All American Temps, Inc. was incorporated in Massachusetts on May 2, 1994. (PX 3)

26. William Woods owns and operates All American Temps, Inc. (PX 1, Deposition of William Woods)

27. Marlene Woods manages the Fitchburg location of All American Temps, Inc. (PX 2, Deposition of Marlene Woods)

28. Blue Collar Temporaries, Inc. was incorporated in Massachusetts on November 16, 1992. (PX 3)

29. The president of Blue Collar Temporaries, Inc is Michael McKinney. (PX 3)

30. The treasurer of Blue Collar Temporaries, Inc. is Cinda Wagner Pittman. (PX 3)

31. Work-A-Day of Fitchburg, Inc. was incorporated in Massachusetts on September 1, 1984. (PX 3)

32. Work-A-Day of Fitchburg, Inc. was dissolved on December 31, 1990. (PX 3)

33. The president of Work-A-Day of Fitchburg, Inc. was respondent Marlene Woods. (PX 3)

34. The treasurer of Work-A-Day of Fitchburg, Inc. was Harold Woods. (PX 3)

35. The registered agent of Work-A-Day of Fitchburg, Inc. was Cinda Wagner Pittman. (PX 3)

36. Work-A-Day of Lowell, Inc. was incorporated in Massachusetts on November 14, 1986, and dissolved on December 31, 1990. (PX 3)

37. The president and registered agent of Work-A-Day of Lowell, Inc. was Harold Woods. (PX 3)

38. The treasurer of Work-A-Day of Lowell, Inc. was Cinda Wagner Pittman. (PX 3)

39. Work-A-Day of Worcester, Inc. was incorporated in Massachusetts on September 1, 1984 and dissolved on December 31, 1990. (PX 3)

40. The president and treasurer of Work-A-Day of Worcester, Inc. was Ann Woods. (PX 3)

41. The registered agent of Work-A-Day of Worcester, Inc. was Cinda Wagner Pittman. (PX 3)

42. Work-A-Day of Nashua, Inc. was incorporated in New Hampshire in 1985 and was dissolved in November of 1991. (PX 3)

43. The president of Work-A-Day of Nashua, Inc. was Harold Woods. (PX 3)

44. The treasurer of Work-A-Day of Nashua, Inc. was Marlene Woods. (PX 3)

45. The secretary of Work-A-Day of Nashua, Inc. was Cinda Wagner Pittman. (PX 3)

46. Harold Woods, the president, treasurer and director of Alternative Staffing, Inc., set up bank accounts, filed papers, was

involved in sales and recruitment of clients, and the placement, transportation and payment of day workers for that company. (TR 136, 246-247)

47. Ann Woods, the president of Able-Temps Referrals, signed the 1990 Stipulation with the Wage and Hour Office and the Respondents' Response to the Secretary's Request for Admissions in the present litigation. Ms. Woods performed bookkeeping duties and placed dayworkers for the companies. (PX 3; TR 135)

48. With the aid of Attorney Robert Holden, William Woods formed Plato Merchandising Corporation and Galactic Management, Inc. as vehicles through which William and Marlene Woods could receive their salaries for overseeing Able Temp Referrals, Alternative Staffing, and All American Temps. (TR 178-179)

49. In response to the Secretary's Request for Admissions, dated February 2, 1995, as to William Woods directing "the business affairs and operations" and controlling "the payroll and recordkeeping" and "the hiring and firing of both employees and dayworkers of both the Worcester and the Fitchburg locations of the corporations doing business as Alternative Staffing", the respondents stated, "Deny. Allege the business affairs of Alternative were managed under a contract with an entity known as Galactic Management." "Deny Able used a d/b/a. Allege the business affairs of Able were managed under contract with Plato Merchandising Corporation." (PX 3)

50. In response to the Secretary's Request for Admission Number 16, "Marlene Woods was a managing employee of Able-Temp's Referrals, Inc.", the respondents stated, "Deny. Able was managed under a consulting contract with a management company known as Plato Merchandising Corp." (PX 3)

51. In response to the Secretary's Request for Admissions, dated February 2, 1995, as to Marlene Woods directing "the business affairs and operations" and control of "the hiring and firing of employees for Alternative Staffing in the Fitchburg location", the respondents stated, "Deny. Allege the business affairs of Alternative were managed under a contract with an entity known as Galactic Management." (PX 3)

52. Respondent Marlene Woods stated in her deposition of May 3, 1995 that she ran the Fitchburg location of Able Temps, Alternative Staffing, and All American Temps. (PX 2)

53. Respondent Marlene Woods stated in her deposition of May 3, 1995 that she hired, fired, and supervised employees at that location. (PX 2)

54. Respondents' employees handle, sell or otherwise work on goods or materials that have been moved in or produced for commerce. (PX 3)

55. The Respondents' business is covered under the "Act". (Stipulation of Parties, dated January 16, 1996 [JX 1])

56. Able Temps Referrals, for the fiscal year 1991, had an annual gross volume of business done in an amount not less than $500,000.00 (exclusive of excise taxes at the retail level that are separately stated). (PX 3)

57. Alternative Staffing, for the fiscal year 1992 and 1993 had an annual gross volume of business done in an amount not less than $500,000.00 (exclusive of excise taxes at the retail level that are separately stated). (PX 3)

58. The Respondents' business provided unskilled workers on a day to day basis to manufacturers and other client companies. (PX 3)

59. The Respondents kept all records on these workers. (Stipulation of Parties, dated January 16, 1996)

60. The Respondents usually paid these workers the minimum wage. (Stipulation of Parties, dated January 16, 1996)

61. The Respondents usually charged client companies between $6.00 and $7.50 per hour per worker for providing these workers. (Stipulation of Parties, dated January 16, 1996)

62. The Respondents usually transported these workers to and from the client company work sites. (Stipulation of Parties, dated January 16, 1996 [JX 1])

63. To receive a placement, a day worker was required to report to an office of the respondents, and was then placed by the respondents with a client agency. (PX 3)

64. The Respondents pay the workers, issuing them pay checks upon receipt of completed invoice forms or work slips which are prepared by the Respondents and completed and signed by the client company. (PX 3)

65. The Respondents did not deduct state income tax from the paychecks of dayworkers during the period between September 1991 and June, 1994. (PX 3)

66. The Respondents did not deduct federal income tax from the paychecks of dayworkers during the period between September, 1991 and June, 1994. (PX 3)

67. The Respondents did not pay into social security for dayworkers during the period between September, 1991 and June, 1994. (PX 3)

68. The Respondents issued a memorandum to dayworkers, specifying the time the workers must arrive at the offices of the Respondents, the behavior that must be exhibited at the client companies and the footwear that must be worn by the workers. (PX 7 and Stipulation of Parties, dated January 16, 1996)

69. The dayworkers' actual tasks at the client companies required no skill. (PX 3)

70. The dayworkers received a fixed hourly rate generally established by the respondents. (PX 3)

71. The dayworkers made no investment in equipment or materials. (TR 197-198; PX 3)

72. The memorandum distributed to dayworkers by the Respondents stated "Do not contact companies on your own. We will schedule work: that is not your job. If you contact a company directly, you will not be sent out again." (PX 7 and Stipulation of the Parties, dated January 16, 1996)

73. The Respondents advertised in the spring of 1993 to client companies that they would "handle all the burden some paperwork, bookkeeping, record keeping, payroll costs, and government reporting." (PX 4)

74. Between the period of September 30, 1991 and July 3, 1994 a total of 619 dayworkers worked a number of hours over forty per week and were not paid time and a half their regular rate for those hours. (PX 6 and Stipulation of the Parties, dated January 16, 1996 [JX 1])

75. If the dayworkers are found to be Respondents' employees under the "Act", the payroll records of the Respondents show that 619 dayworkers are owed a total of $142,409.16 in backwages between September 30, 1991 and July 3, 1994 for overtime hours worked by the dayworkers for which they received only their straight time pay. (PX 6; Stipulation of Parties, dated January 16, 1996 [JX 1])

76. The payroll records furnished by the Respondents show that for the period between September 30, 1991 and July 3, 1994, the Respondents paid 4199 dayworkers $4,366,285.50 for a total of 974,115.22 hours worked at client companies. (PX 6; Stipulation of Parties, dated January 16, 1996 [JX 1])

77. The Supreme Court of New Hampshire in 1989 ruled that Respondents' dayworkers did not engage "in an independently established trade, occupation, profession or business" for purposes of unemployment compensation. (PX 3)

78. The Massachusetts Commissioner of Employment and Training ruled in 1989 for purposes of the unemployment compensation statute that Respondents' dayworkers were employees of the Respondents. (PX 3)

79. The Supreme Judicial Court for the Commonwealth of Massachusetts remanded the case referred to in number 78 back to the Board of Review in 1992 for the purposes of determining whether the workers were employed by the Respondents, their clients or both the Respondents and their clients for purposes of the unemployment compensation statute. (PX 3)

80. The Board of Review in Massachusetts ruled in 1994, in the case referred to in No. 78, that for the purposes of unemployment compensation, the dayworkers were employed by the Respondents. (PX 3)

81. In 1990, the U.S. Department of Labor began their first investigation of the Respondents. (TR 48-49)

82. Investigator William Pickett was contacted by Attorney James Walsh, who stated that he was representing the Respondents in the investigation, and that all questions should be directed to him. (TR 48, 49, and 338)

83. On December 5, 1989, Mr. Pickett met with Attorney Walsh at his office. (TR 50)

84. On December 5, 1990, Mr. Pickett looked at records of "in-house" workers such as clerical and telemarketing employees and told Attorney Walsh that they were being paid in compliance with the "Act". (TR 50-51, 59, and 65)

85. On December 5, 1990, Mr. Pickett specifically requested payroll information and time records of the day workers. (TR 51)

86. On December 5, 1990, Mr. Pickett gave Attorney Walsh a copy of a government publication entitled "Employment Relationship Under the Fair Labor Standards Act". (TR 51; PX 20)

87. On December 5, 1990, Mr. Pickett reviewed with Attorney Walsh the six factors that the U.S. Supreme Court uses to help people make a distinction between an employee and a nonemployee under the "Act". (TR 53)

88. Attorney Walsh remembered Mr. Pickett indicating that the Department's position was that the dayworkers were employees under the "Act". (TR 283)

89. A letter dated Feb. 2, 1990 was sent to the Respondents specifically requesting payroll information and time sheets for all temporary workers. No records of in-house workers were requested in this letter. (TR 56-57, 59; PX 11)

90. Mr. Pickett received no time records of the temporary workers during the investigation. (TR 60-62)

91. The Respondents had been keeping time records on the temporary workers since approximately 1985. (PX 1, Deposition of William Woods, 30-31)

92. The Wage and Hour Department cited the Respondents for recordkeeping violations and entered into a stipulation of compliance with the Respondents in April of 1990. (PX 3)

93. Subsequent to signing the stipulation, the Respondents continued classifying the temporary workers as independent contractors and not paying them overtime for hours worked over 40 per week. (PX 6, PX 3, Stipulation of the Parties [JX 1])

94. Mr. Pickett began a second investigation of the Respondents in July of 1992. (TR. 65-66)

95. Mr. Pickett was contacted by John Bresnahan, the Respondents' certified public accountant, in August of 1992. (TR 67)

96. Mr. Bresnahan advised Mr. Pickett to direct all questions through him and to not contact the Respondents directly. (TR 338-339)

97. Mr. Pickett requested payroll records and time sheets of all employees of the Respondents in August, 1992. (TR 67)

98. On December 4, 1992, Mr. Pickett met with Mr. Bresnahan and told him his position was that the temporary workers were employees, and gave him the booklet "Employment Relationship Under the Fair Labor Standards Act". (TR 70-71, 312; PX 20)

99. No records were produced between December, 1992 and March, 1993. (TR 72-78)

100. The Wage and Hour Office served a subpoena on Harold Woods for the payroll records and timesheets on March 28, 1993. (TR 80, 85; PX 3)

101. On April 16, 1993, Attorney DeFranceschi delivered to Mr. Pickett a statement refusing to comply with the subpoena. (TR 86-87, PX 3)

102. The Secretary of Labor filed a Motion to Enforce **Subpoena Duces Tecum** in Federal District Court, and the motion was granted in July of 1993. (PX 3)

103. On October 18, 1993 Investigator Patricia Colarossi met with Mr. Bresnahan to examine the records requested in the subpoena. (TR 104-107; PX 3)

104. All the records listed on the subpoena were not present on October 18, 1993 at the office of Mr. Bresnahan. (TR 104-107; PX 3)

105. Ms. Colarossi was not cleared by Mr. Bresnahan to take out of his office the records that were present on October 18, 1993. (TR 107)

106. On November 4, 1993, Attorney Susan G. Salzberg, representing the Plaintiff, called Attorney DeFranceschi and requested that he ensure his clients produced all records stated in the Subpoena Duces Tecum. (PX 3)

107. On December 9, 1993, Attorney Salzberg again called Attorney DeFranceschi and told him to produce all records stated in the Subpoena Duces Tecum or the Secretary would proceed with a contempt action. (PX 3)

108. The Respondents acted willfully, with reckless disregard of the "Act", by not providing records of time worked by the day workers when requested by the Wage and Hour Division of the Department of Labor during the 1990 investigation, and not informing the Wage and Hour Division that those records existed. (TR 51; PX 1)

109. The Respondents acted willfully, with reckless disregard of the "Act", by not providing records in the second investigation, even subsequent to a Federal District Court Order for their production, and continuing to fail to produce those records until informed by the Office of the Regional Solicitor that failure to produce those records would result in the initiation of a contempt proceeding. (PX 3)

110. The Respondents acted willfully, with reckless disregard of the "Act", by not paying the dayworkers overtime for hours worked over 40 per week, after having been told by the New Hampshire and Massachusetts state courts that the dayworkers were their employees, and after having been told by Investigator Bill Pickett that the dayworkers were their employees under the Act.

(TR 283; PX 3, PX 6)

B. Conclusions of Law

1. Jurisdiction of this action is conferred upon this Court by Section 16(e) of the Act, 29 U.S.C. §216.

2. Respondents are an enterprise engaged in commerce or in the production of goods for commerce within the meaning of section 3 (s) of the Act. 29 U.S.C. §203(s).

3. The temporary workers at issue in this case, looking at the "totality of the circumstances", "as a matter of economic reality" are employees of the respondents as defined by the Act. **Martin v. Selker Brothers, Inc.**, 949 F.2d 1286 (3d Cir. 1991); **Sec'y of Labor v. Lauritzen**, 835 F.2d 1529 (7th Cir. 1987) **cert. denied**, 488 U.S. 898 (1988); **Brock v. Superior Care, Inc.**, 840 F.2d 1054, 1058-1059 (2d Cir. 1988); **Brock v. Mr. W. Fireworks, Inc.**, 814 F.2d 1042 (5th Cir. 1987), **cert. denied**, 484 U.S. 924 (1987); **Martin v. Albrecht**, 802 F. Supp. 1311 (W.D. Pa. 1992).

4. The individual Respondents William Woods, Marlene Woods, Harold Woods and Ann Woods are employers of the temporary workers as defined under the Act. **Donovan v. Agnew**, 712 F.2d 1509 (1st Cir. 1983); **Donovan v. Sabine Irrigation**, 695 F.2d 190 (5th Cir. 1981).

5. The Respondents have violated Section 7 of the Act by not paying overtime to temporary workers working over 40 hours per week. 29 U.S.C. §207.

6. The Respondents have violated Section 11 (c) of the Act by failing to produce records, when requested in the course of an investigation, to the Department of Labor. 29 U.S.C. § 211(c).

7. The Respondents' violations of the Act were willful, as defined by the civil money penalty regulations, in that the Respondents knew their conduct was prohibited by the Act since they had received advice from a responsible official of the Wage and Hour Division to the effect that their conduct was not lawful. 29 CFR §§578.3(c)(1) and 578.3(c)(2).

8. The Respondents' violations were willful, as defined by the civil money penalty regulations, in that the Respondents had knowledge that the temporary workers were not independent contractors. 29 CFR §578.3(c)(1).

9. The Respondents' violations were willful in that the Respondents knew that their conduct was prohibited by the Act and showed reckless disregard for the requirements of the Act. 29 CFR §578.3(c)(1).

10. The civil money penalties of $150,000.00 are appropriate based on the seriousness of the violations, the size of the Respondents' business, Respondents' past history and their failure to take appropriate steps to comply with FLSA for almost five years. 29 CFR §§578.4(a), 579.5.

ORDER

Accordingly, it is determined that the civil money penalties assessed herein are appropriate, that the Administrator's assessment is AFFIRMED and that such penalties shall be paid to the Department by the Respondents joined herein, pursuant to 29 CFR §580.32.

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DAVID W. DI NARDI
Administrative Law Judge

Boston, Massachusetts

DWD:ln